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No. 04-278

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,
Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHRYN GONZALES, and LESLIE GONZALES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL LEAGUE OF CITIES, NATIONAL SHERIFFS' ASSOCIATION, AND COUNTY SHERIFFS OF COLORADO IN SUPPORT OF PETITIONER

BRAD D. BAILEY
Counsel of Record
Office of the City Attorney
2255 W. Berry Avenue
Littleton, CO 80165
(303) 795-3725

[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

DAVID PARKHURST
NATIONAL LEAGUE OF CITIES
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20005
(202) 626-3033

LANI WILLIAMS
INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION (IMLA)
1110 Vermont Avenue, NW
Suite 200
Washington, D.C. 20005
(202) 466-5424

KATHRYN L. SCHROEDER
5334 S. Prince Street
Littleton, CO 80166-0001
(303) 795-4639

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INTEREST OF *AMICI* *

The International Municipal Lawyers Association ("IMLA") is a professional organization consisting of more than 1,400 member entities. Its membership includes cities and coun-

* Pursuant to 37.6, *amici curiae* disclose that no counsel for any party in this case authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent for filing this brief are on file with the clerk.

ties, as represented by their chief legal officers, state municipal leagues, and individual attorneys who represent local government entities. IMLA has provided services and educational programs to local government attorneys since 1935.

The National League of Cities ("NLC") is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States communities. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

The National Sheriffs' Association ("NSA") is a nonprofit professional organization consisting of more than 21,000 individual members and serves as the advocate for 3088 sheriff's offices. The membership of NSA is comprised of sheriffs throughout the United States, and the attorneys who advise and represent them. The County Sheriffs of Colorado ("CSOC") is a nonprofit, nonpartisan professional organization consisting of 64 elected Colorado Sheriffs and has an honorary membership of 6,968.

The senseless tragedy that precipitated the underlying legal questions disturbs and offends *amici* and their members. The grievous facts, however, must not overshadow the proper resolution of the important constitutional issues presented by the Town of Castle Rock's petition. *Amici*, as advocates for the interest of local governments and the communities that they serve, file this brief on behalf of their members nationwide.

SUMMARY OF THE ARGUMENT

Mrs. Gonzales' constitutional claim under 42 U.S.C. § 1983 depends on whether the Town of Castle Rock, through its police officers, deprived her of property without due process of law. The holding of the Tenth Circuit Court of Appeals in this case ignores the purpose of the due process clause in the 14th Amendment.

The purpose of the due process clause is to place limitations upon the power of the government to interfere with an individual's life, liberty, or property. Mrs. Gonzales seeks to use the due process clause to protect her from dangers posed by others, not dangers posed by the State.

The Colorado General Assembly mandated arrests in instances where probable cause indicated a violation of a protective order issued in a domestic relations case. The General Assembly wished to insure consequences for those who violate such orders. The General Assembly's purpose was to deter the violation of protective orders and to eliminate further acts of domestic violence.

The intent of the legislature was not to create a property interest in the enforcement of court orders. The Colorado statute was never intended to create a claim of entitlement to police protection. State legislatures need wide latitude in dealing with various social problems including domestic violence. If the Tenth Circuit's decision is upheld, states will lose that flexibility.

If the Court upholds the decision of the Tenth Circuit, potentially every criminal statute would grant the victims of crime a constitutionally protected property right to police protection. Such a holding would increase costs for local government that they cannot absorb.

To deal with the allocation of scarce resources, financial and otherwise, possessed by local governments, the federal courts may become responsible for the operation of counties

and municipalities through lawsuits. The courts will end up telling local government officials how to allocate their limited time and resources to solve the various problems that local governments must address. For these reasons, the *amici* support the Town of Castle Rock in urging this Court to reverse the decision of the Tenth Circuit Court of Appeals.

ARGUMENT

I. THE DUE PROCESS CLAUSE IMPOSES NO DUTY TO PROVIDE POLICE PROTECTION TO THE HOLDER OF A RESTRAINING ORDER

Mrs. Gonzales' constitutional claim under Section 1983 depends on whether the Town of Castle Rock, through its police officers, can be said to have disobeyed the constitutional command "nor shall any state deprive any person of life, liberty or property, without due process of law." U.S. Constitution Amendment XIV, Section 1. The Tenth Circuit held that the Colorado Statute, requiring mandatory arrest when probable cause exists to believe a court issued domestic relations restraining order has been violated, created a property right in favor of Mrs. Gonzales, which could not be denied without due process. By doing so, the court created a property right out of whole cloth, sidestepping this Court's holding in *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).

The due process clause is "a restraint on the power of the states," *The Slaughter-House Cases* 83 U.S. (16 Wall) 36, 80 (1873). "It forbids the state itself to deprive individuals of life, liberty, or property without 'due process of law' but its language cannot fairly be extended to impose an affirmative obligation on the State to insure those interests do not come to harm through other means." *DeShaney* at 195.

Mrs. Gonzales seeks to use the due process clause to require government to act to relieve her from the dangers

posed by others in society. It was not the Town of Castle Rock or its police officers who murdered Rebecca, Catherine and Leslie Gonzales. It was their father, Simon Gonzales who committed these atrocious acts. Like the parolee responsible for the murder at issue in *Martinez v. California*, 444 U.S. 277 (1980), Simon Gonzales was in no sense an agent of the Town of Castle Rock when he murdered his three children.

II. STATES SHOULD BE ALLOWED TO ADDRESS SOCIAL ILLS WITHOUT INCURRING LIABILITY WHEN THE RESULTS ARE UNSATISFACTORY

Domestic violence is a crime, although it was not recognized as such by the police or state legislatures of many states until recently. *See* United States Attorney General's Task Force on Family Violence, *Final Report* 11, 23 (1984) (indicating that violence between strangers was classified as assault, while violence between family members was classified as a family squabble, not rising to the level of a real crime.) For instance "domestic violence" was not a separate crime in Colorado until January 1, 1989. 1988 Colo. Sess. Laws 731. Prior to the creation of this new crime, prosecutors charged defendants with assault, murder, manslaughter, harassment, and criminal mischief.

A. Colorado's Attempt to Stem Domestic Violence

In 1984, Colorado allowed victims to seek mandatory protection orders against persons who posed a threat to them. 1984 Colo. Sess. Laws 500. However, in the opinion of the Colorado General Assembly, the 1989 creation of the new crime of domestic violence, coupled with the availability of a mandatory protection order, was still insufficient to eradicate the problem of domestic violence. Therefore, in 1991, the General Assembly consolidated all protection orders under one statutory section and criminalized violations of protective

orders. *See* 1991 Colo. Sess. Laws. 418, codified at Colo. Rev. Stat. §§ 13-14-101 through 104 and 18-6-803.5 (2004). The mandatory arrest provision for the violation of protective orders was added by the Colorado General Assembly in 1994. 1994 Colo. Sess. Laws 2027.

As suggested above, prior to 1991, Mrs. Gonzales could have gone to court and gotten a restraining order issued under Colorado Rule of Civil Procedure 65 and Mr. Gonzales could have been punished by the issuing court for contempt had he violated the order. It is firmly established that "the power to punish for contempt is inherent in all courts." *Ex parte Robinson*, 19 Wall. 505, 510 (1874). The contempt power reaches both conduct before the court and that beyond the court's confines. *Young v. United States, ex rel Vuitton et Phils S.A.*, 481 U.S. 787, 798 (1987).

However, the crowded nature of state court dockets, and the difficulty of getting persons who violate court orders in front of a judge, motivated the Colorado General Assembly, in part, in its crusade against domestic violence to create an additional enforcement mechanism for violation of protection orders. Therefore, the General Assembly made it a crime to violate a restraining order entered in a domestic relations case, and added the additional deterrent of mandatory arrest upon probable cause.

Colorado is not alone in mandating the arrest of persons who violate protective orders. Some 19 states require an arrest when a police officer has probable cause to believe that such orders have been violated. *See* Conn. Gen Stat. Ann. § 46b-15a (2004) (foreign only); Del. Code. Ann. tit. 10, § 1046 (2004); Ky. Rev. Stat. Ann. § 403.760 (2004); Me. Rev. Stat. Ann. tit. 19-A, § 4012 (2004); Md. Code. Ann., Cts. & Jud. Proc. § 3-1503.1 (2004); Minn. Stat. Ann. § 518B.01 (West 2004); Miss. Code Ann. § 99-3-7 (2004); Mo. Ann. Stat. § 455.085 (West 2004); Nev. Rev. Stat. Ann. 33.070 (West 2004); N.H. Rev. Stat. Ann. § 173-B:9 (2004);

N.M. Stat. Ann. § 40-13-6 (West 1978); N.C. Gen. Stat. Ann. §50B-4 (West 2004); N.D. Cent. Code § 14-07.1-11 (2004); Pa. Stat. Ann. tit 32, § 6113 (West 2004); S. C. Code Ann. § 16-3-1800 (West 2004); S.D. Codified Laws § 23A-3-2.1 (West 2004); Tex. Crim. Proc. Code Ann. Art. 14.03 (West 2004); Wash. Rev. Code Ann. §§ 26.50.110, 26.52.070 (West 2004); Wis. Stat. Ann. § 813.12 (West 2004). Thus, the ramifications of the Court's decision will reach local governments throughout the United States.

B. Due Process Rights Are Not Created by States' Attempts to Deal More Effectively With Crime

To have a property interest in a government benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Mrs. Gonzales had a property right in access to the courts to obtain a restraining order to prevent her husband from committing acts of violence against her or their children. *See Boddie v. Connecticut*, 401 U.S. 371 (1971). Mrs. Gonzales and the court which issued the protective order in this case surely expected that her ex-husband would abide by the terms and conditions of the order. Mrs. Gonzales may also have hoped that if Mr. Gonzales was proven to have violated the order he would been punished by the courts.

However, neither of these expectations rise to the level of creating a property right under *Roth*. Even the addition of the directive to law enforcement officers to arrest violators of protective orders does not lead to the creation of a property right. Without the creation of a right, it is difficult to support the Tenth Circuit's decision that Mrs. Gonzales was owed any process.

III. THE CONSEQUENCES OF FINDING A VIOLATION OF THE DUE PROCESS CLAUSE

If criminalizing the conduct at issue here creates a constitutional right to protection, which cannot be displaced without a hearing, then every criminal statute grants to victims a constitutionally protected property right to protection from violations of those statutes. For instance, local governments would be liable when they receive information regarding a crime in progress, but fail to respond "adequately enough" to prevent the crime. Taken to its extreme, the Tenth Circuit opinion requires local governments wishing to insure the protection of beneficiaries of restraining orders to assign a law enforcement officer to act as a body guard 24 hours a day, seven days a week, 365 days a year.

Not only would violations of criminal statutes create local government liability, but other statutes which impose an affirmative obligation upon local government to do something would also create governmental liability. For example, child protection statutes and statutes that work to protect the public health would create property rights in citizens, the "deprivation" of which could not be accomplished without a hearing. The "deprivation" need not be the consequence of some nefarious decision by local government officials or employees, but could result simply from the fact that local governments are over-taxed in all respects and hard decisions need to be made regarding which services and actions take priority at any given time or in any given situation. In some cases, it may be that even in spite of the best efforts of the local government, a particular loss or harm cannot be prevented. Yet under the Tenth Circuit's rule, the government's best efforts are of no consequence—the government is liable. Holding local governments liable for failing to protect crime victims or for failing to immediately cure violations of court orders and the like creates an enormous liability on behalf of locall governments. That cost would be impossible for the

local governments to absorb. In an effort to cover these cost, local governments would divert limited public resources away from services and infrastructure needs and into higher insurance premiums, litigation judgments, and settlement agreement payouts.

The observations made by the First Circuit in a similar case are pertinent here:

> enormous economic consequences could follow from the reading of the Fourteenth Amendment that Plaintiff here urges. Firemen who have been alerted to the victim's peril but fail to take effective action, municipal ambulances which, when called, arrive late; and myriad other errors by State officials in providing protective services, could all be found to violate the Constitution. It would seem appropriate that the citizenry, acting through state legislatures and state courts, should determine how far it wishes to go in reimbursing claims of this type.

Estate of Gilmore v. Buckley, 787 F.2d 714, 722-723 (1st Cir. 1986). Under the Tenth Circuit's holding, any local government act which is mandated by a state statute but not performed by the government would constitute a federal constitutional violation unless a pre-deprivation hearing was held. This simply cannot be accurate. If it is accurate, the federal courts will shortly be required to become involved in almost every aspect of the provision of local government services. The federal courts would become responsible for telling local government how to allocate their limited time and resources among the various law enforcement and other problems clamoring for their attention. *See Tuffend Sam v. Dearborn County Board of Health*, 385 F.3d 1124 (7th Cir. 2004).

Additionally, the federal courts would see their dockets swell because there would be no reason and no incentive for citizens who believe that their rights have been violated

through the inaction of local government to use the state courts to press a tort claim for redress of their grievance. The federal constitutional violation, coupled with the availability of attorneys fees under 42 U.S.C. § 1988 (2004) make the federal courts a much more attractive forum to vindicate potential plaintiffs' rights.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

BRAD D. BAILEY
Counsel of Record
Office of the City Attorney
2255 W. Berry Avenue
Littleton, CO 80165
(303) 795-3725

DAVID PARKHURST
NATIONAL LEAGUE OF CITIES
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20005
(202) 626-3033

LANI WILLIAMS
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION (IMLA)
1110 Vermont Avenue, NW
Suite 200
Washington, D.C. 20005
(202) 466-5424

KATHRYN L. SCHROEDER
5334 S. Prince Street
Littleton, CO 80166-0001
(303) 795-4639